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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent, E034756

v. (Super.Ct.No. FSB037597)

JASON NATHANIEL WEBSTER, OPINION

Defendant and Appellant.

APPEAL from the Superior Court of San Bernardino County. Kenneth Barr, Judge. Affirmed.

Michael R. Totaro, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy

Senior Assistant Attorney General, and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

#### 1. Introduction

Defendant Jason Nathaniel Webster appeals from a judgment convicting him of committing a carjacking and an assault with a deadly weapon. On appeal, defendant raises the following claims: the trial court erred in denying his request for a special fingerprint instruction; the prosecutor committed misconduct during closing argument; insufficient evidence supported his convictions; and the trial court erred in selecting the upper term based on facts not found by a jury beyond a reasonable doubt.

For the reasons provided below, we reject defendant's arguments and affirm his convictions.

### 2. Factual and Procedural History

At 10:30 p.m. on November 21, 2002, Demetrio Townsend was driving his 1997 Chevrolet Tahoe on Interstate 10 in San Bernardino County. After exiting the freeway on Date Street, Townsend pulled over to telephone a friend for directions. As he was talking to his friend, two men walked toward him, one on each side of his vehicle. The man who stood by the driver's side door pointed his gun at Townsend's head through the open window and told him to get out of the vehicle. As Townsend complied, the gunman entered the vehicle and drove off. Townsend walked away and called the police. After the police arrived, Townsend gave the police a description of the gunman and his companion. According to Townsend, the gunman was an African-American man who was wearing a bandana or a wave cap on his head possibly with braided hair underneath.

Two days later, Townsend found his Tahoe with extensive damage and items and parts removed. Forensic technicians discovered defendant's fingerprints on the exterior of the driver's side door.

About a month after the incident, Townsend identified defendant as the gunman during a photographic lineup. By the time of trial, however, Townsend testified that defendant looked like the gunman, but admitted that he could not be certain.

On July 3, 2003, the San Bernardino County District Attorney charged defendant with committing a carjacking (Pen. Code, § 215, subd. (a))<sup>1</sup> and an assault with a deadly weapon (§ 245, subd. (a)(2)). The district attorney also charged defendant with personally using a firearm during the commission of both offenses. (§§ 12022.5, subd. (a)(2), & 12022.53, subd. (b).)

A jury returned guilty verdicts on both counts and true findings on the firearm enhancement allegations. The court sentenced defendant to a total prison term of 19 years.

# 3. <u>Fingerprint Instruction</u>

Defendant claims the trial court erred in denying his request for a special instruction on fingerprint evidence.

During the trial, defendant asked to court to give the jury the following instruction:

"Fingerprints by themselves do not establish that the defendant committed the crime charged. They establish only that the defendant touched the item in question.

"[Thus, a guilty verdict may not be based on fingerprint evidence alone unless the prosecution has proven beyond a reasonable doubt that the fingerprints were left at the time that the crime was committed.]"

The prosecutor objected to the instruction as cumulative and unnecessary. The prosecutor also argued that the optional bracketed language incorrectly required more than was necessary to establish defendant's guilt.

After further consideration, the trial court denied the requested instruction. The court found that, based on the other evidence presented at trial, the instruction inappropriately limited the jury's consideration of the fingerprint evidence.

A trial court is required to give pinpoint instructions when requested and when the proposed instruction is supported by substantial evidence and is neither argumentative nor cumulative. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1176.) Of course, the court also has no duty to give an instruction that incorrectly states the law. (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

In this case, the court properly rejected defendant's proposed instruction. As recognized by both the prosecutor and the court below, the instruction is argumentative, in that, it directs the jury to draw a certain inference from the evidence that is favorable to the defense. Based on the instruction, if there is no other evidence of identity, then the only permissible inference is that defendant touched the item.

<sup>[</sup>footnote continued from previous page]

<sup>&</sup>lt;sup>1</sup> All further statutory references will be to the Penal Code unless otherwise stated.

The instruction is both inaccurate generally and inapplicable specifically to the facts in this case. From fingerprint evidence alone, the jury may infer not only that defendant touched the item, but also that defendant was the person who committed the crime. "Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant. [Citations.] The jury is entitled to draw its own inferences as to how the defendant's prints came to be on the bag and when [citation] and to weigh the evidence and opinion of the fingerprint experts." (*People v. Gardner* (1969) 71 Cal.2d 843, 849.) The instruction, therefore, inappropriately limited the jury's consideration of the fingerprint evidence.

The instruction also does not apply under the facts in this case. The court has no obligation to give an instruction that is not supported by substantial evidence, that is, evidence sufficient to deserve consideration by the jury. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) In this case, the prosecution presented other evidence of identification. Although Townsend could not confirm with certainty the gunman's identity during the trial, he unequivocally identified defendant as the gunman during the photographic lineup conducted one month after the carjacking. The fingerprints on the exterior of the driver's side door matched that of defendant. Defendant provided no other reasonable explanation for the presence of his fingerprints on Townsend's Tahoe.

It would have been error for the court to give an instruction that was an inaccurate statement of law and had no application to the facts in the case. Also, defendant failed to suggest any modification that would have cured the defects in the proposed instruction. The court, therefore, properly denied defendant's request to give the special instruction.

## 4. Prosecutorial Misconduct

Defendant claims the prosecutor committed prejudicial misconduct when he discussed the fingerprint evidence during his closing argument.

During his closing argument, the prosecutor emphasized that there was no evidence to explain why defendant's fingerprints were on Townsend's Chevrolet Tahoe. He argued, "There's no reason at all why his fingerprints should be on this car, and yet they are. [¶] I don't know about you, there is certainly also the simple possibility maybe he touched the car. I don't know about you, but I don't go around touching other people's cars very often." Defendant's trial attorney objected to the prosecutor's argument and the court sustained the objection. After apologizing, the prosecutor rephrased his comments in terms of common experience.

The prosecutor later stated that the forensic specialist "dusted every area, she said, which could possibly be lifted. She found a total of three, and two of those three were exactly to Mr. Webster, exactly. Those are, as I said, indisputable facts that you are going to have to resolve in coming to your decision whether he is guilty or not guilty. If you say not guilty, you are going to have to, I would submit, explain that away." Defendant's attorney again objected on the ground that the prosecutor misstated the law. The trial court overruled the objection and advised the jury that the attorney's arguments did not constitute evidence.

Based on these two statements, defendant argues that the prosecutor committed misconduct by misstating the law and, particularly, reducing the prosecution's burden of proof. Defendant argues that he had no affirmative duty to present evidence to explain

his fingerprints and the jury could have found him not guilty simply by rejecting the prosecution's evidence.

The prosecutor generally is given wide latitude in presenting closing argument. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The prosecutor may provide fair comment on the evidence, state matters of common knowledge or experience, and argue strenuously for a particular interpretation or verdict. (See *ibid*.)

To demonstrate a violation of the federal Constitution, defendant must show that the prosecutor's conduct so infected the trial that it resulted in a denial of due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 122.) Even if the prosecutor's conduct does not amount to a denial of due process, the prosecutor's misconduct may constitute a violation of state law where the prosecutor uses deceptive or reprehensible means of persuading the jury. (*Ibid.*)

The record fails to establish prosecutorial misconduct. Although defendant had no burden to present evidence to explain his fingerprints, the prosecutor simply argued that a not guilty verdict required some other explanation for the presence of defendant's fingerprints on the stolen vehicle. There was nothing reprehensible or intemperate in the prosecutor's comments. The case hinged on the issue of identity and the evidence of defendant's fingerprints. The prosecutor's tactic was to convince the jury that they had to find defendant guilty unless another explanation existed for the presence of defendant's fingerprints on the stolen vehicle. The prosecutor's comments amounted to nothing more than proper argument. The prosecutor's passing comment did not mislead the jury into

believing that defendant had the burden of presenting evidence or that the prosecution was relieved of establishing each element of the crimes beyond a reasonable doubt.

Moreover, even if the jury construed the prosecutor's statement as defendant suggests, the record reveals that defendant suffered no resulting prejudice. (See *People v*. Allison (1989) 48 Cal.3d 879, 893-894.) Before the prosecutor's closing argument, the court fully instructed the jury on the prosecution's burden of proof. After the court overruled the prosecutor's statement, the court warned the jury to not consider the attorneys' statements as evidence or conclusive statements of law. The court specifically told the jurors that, "if there is any conflict between the attorneys' statements on the law and my instructions on the law, you are to follow my instructions on the law." The prosecutor then explained that his intention was to impress upon the jurors that a finding of not guilty must be based on reasonable doubt or, as applied here, a reasonable explanation for the presence of defendant's fingerprints on the stolen vehicle. Based on the court's instructions and the prosecutor's clarification, we conclude that, even if the prosecutor's comments were inappropriate, defendant cannot establish any prejudice under either the federal or state standard.

#### 5. Insufficient Evidence

Defendant claims that there was insufficient evidence that he was the person who committed the crimes.

In reviewing a claim challenging the sufficiency of the evidence, we consider the entire record in the light most favorable to the judgment and determine whether there is substantial evidence—i.e., evidence that is reasonable, credible, and of solid value—such

that a reasonable trier of fact would find defendant guilty beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Out-of-court identification evidence is measured by the same standard. Out-of-court identification evidence is considered with other evidence in the record to determine whether, based on this evidence, a reasonable trier of fact could find defendant guilty beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 274.)

Townsend's out-of-court identification and the fingerprint evidence constituted substantial evidence that defendant was the gunman. Although Townsend was unable to say for certain that defendant was the gunman eight months after the incident during the trial, he was certain that he had identified the right man during the photographic lineup. One month after the incident, Townsend examined six black and white photographs and selected defendant's photograph as depicting the gunman involved in the carjacking. At the time, Townsend's memory of the incident was fresh in his mind.

The forensic technicians also discovered two of defendant's fingerprints on Townsend's Chevrolet Tahoe. The record revealed no other reasonable explanation for the presence of defendant's fingerprints on the vehicle. Although defendant claims that his fingerprints alone do not establish the crimes charged, defendant failed to present any evidence to suggest that his participation was limited to receiving stolen property or taking some item from the vehicle. Defendant altogether denied any involvement with the carjacking.

Although the record contained other evidence that may cast doubt on Townsend's out of court identification, for purposes of our analysis, we need not determine whether

substantial evidence supported a different conclusion. Rather, we must uphold the jury's conclusion that defendant was the gunman so long as substantial evidence supported it. (See *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324.) The fingerprint evidence alone would have been sufficient to support the jury's verdicts. (*People v. Preciado* (1991) 233 Cal.App.3d 1244, 1246.) The fingerprint evidence together with Townsend's prior identification more than adequately supported defendant's convictions.

#### 6. Blakely

In his supplemental opening brief, defendant claims the trial court erred in imposing the upper term for the carjacking offense based on facts that were not found true by a jury beyond a reasonable doubt.

During the sentencing hearing, the court considered the circumstances in aggravation and mitigation to select the upper term for the carjacking. While the court found no factors in mitigation, the court relied on several factors in aggravation. The facts relating to the crime were: the crime involved a threat of great bodily injury; the victim was particularly vulnerable; defendant occupied a position of leadership; the crime was carried out in a manner that indicated planning; and defendant committed other crimes for which consecutive sentencing could have been imposed. The facts relating to defendant were: defendant's violent conduct indicated a danger to society; his prior convictions were of increasing seriousness; and he was on probation at the time of the offense. The court found that these facts justified the imposition of the upper term.

In response to defendant's challenge to the court's sentencing decision, the People argue that defendant has forfeited his right to assert his challenge by failing to raise an

objection below. However, because the rule established in *Blakely v. Washington* (2004) 542 U.S. \_\_\_ [124 S.Ct. 2531] could not have been anticipated, we reject the People's argument. (*People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369.)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held the Sixth Amendment right to a jury trial required a jury finding beyond a reasonable doubt for any fact that increased the penalty for a crime beyond the statutory maximum. The *Blakely* decision expanded the holding in *Apprendi* by defining the term "statutory maximum" as the maximum sentence imposed based on the facts specifically found by the jury or admitted by the defendant. (*Blakely, supra,* 542 U.S. at p. \_\_\_ [124 S.Ct. at p. 2537].) In applying *Blakely*'s definition to California's determinate sentencing scheme, the maximum sentence authorized solely by the jury's verdict is the middle term. (§ 1170, subd. (b); *People v. Lemus* (2004) 122 Cal.App.4th 614, 621; *People v. Barnes* (2004) 122 Cal.App.4th 858, 880; *People v. Butler* (2004) 122 Cal.App.4th 910, 917-918.)

Regardless, a reviewing court will not set aside a sentence unless there is a reasonable probability that the trial court would have imposed a different sentence had the court not considered the inappropriate factors. (See *Butler, supra*, 122 Cal.App.4th at p. 919.) Traditionally, in cases where the trial court has included inappropriate factors in selecting the aggravated term, the reviewing court has upheld the trial court's decision so long as it relied on one or more valid factors. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758-1759.) Even a single factor is sufficient to support the trial

court's decision. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) There is no reason to depart from this traditional approach.

In this case, in addition to the inappropriate factors, the trial court also relied on two recidivist factors, namely, that defendant's prior crimes were of increasing seriousness and that he was on probation for a prior offense at the time that he committed the current offenses. Recidivism provides an exception to the rule. No jury determination is required for factors relating to defendant's recidivism. (See *People v. Earley* (2004) 122 Cal.App.4th 542, 550; *People v. George* (2004) 122 Cal.App.4th; *People v. Sample* (2004) 122 Cal.App.4th 206, 224-225; *People v. Butler, supra*, 122 Cal.App.4th at p. 920; see also *Apprendi, supra*, 530 U.S. at p. 489, citing *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224.) Because the trial court's decision could have been based entirely on the recidivist factors, the court's reliance on the other aggravating factors was harmless beyond a reasonable doubt.

We conclude that no prejudicial error resulted from the trial court's decisions to select the upper term for the carjacking.

# 7. <u>Disposition</u>

We affirm defendant's convictions.

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	<u>s/Gaut</u>	J.
We concur:		
s/McKinster Acting P. J.		
s/King J.		